

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
BIG STONE GAP DIVISION**

By: James P. Jones  
United States District Judge

Callie A. Harris filed this action challenging the final decision of the Commissioner of Social Security (“Commissioner”) denying the plaintiff’s claim for supplemental security income (“SSI”) benefits under title XVI of the Social Security Act, 42 U.S.C.A. §§ 1381-1383d (West 1991 and Supp. 2002) (“Act”). Jurisdiction of this court exists pursuant to 42 U.S.C.A. § 1383(c)(3). Both parties have filed motions for summary judgment. The parties have briefed the issues and the case is now ripe for decision.

My review is limited to a determination as to whether there is substantial evidence to support the Commissioner's final decision. If substantial evidence exists, this court's "inquiry must terminate," and the final decision of the Commissioner must be affirmed. *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966). Substantial evidence has been defined as "evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance." *Id.*

Harris applied for SSI benefits on May 19, 1999, alleging disability since February 1, 1999, due to heart problems, shortness of breath, numbness in her hands, back problems, "nerves," and high blood pressure. The plaintiff had a hearing before an administrative law judge ("ALJ") on May 23, 2000. By decision dated November 21, 2000, the ALJ found that despite the plaintiff's impairments, she was not disabled within the meaning of the Act. The Social Security Administration's Appeals Council denied review, and the ALJ's opinion constitutes the final decision of the Commissioner.

The plaintiff was thirty-eight years old at the time of the ALJ's decision, a younger individual under the regulations. She has a tenth grade education and past relevant work experience as a furniture sander, a highway department flagperson, and a lumber packer.

In rendering his decision, the ALJ reviewed medical records from Twin County Regional Hospital; Robert Pryor, M.D.; Howard Leizer, Ph.D.; Randall Hays, M.D.; Frank Johnson, M.D.; Mark Mattson, M.D.; Ralph Capaldo, M.D.; and Lee Booher, M.A. At Harris' administrative hearing, the ALJ also considered the testimony of the plaintiff and Loretta Harris, a vocational expert.

Based upon this evidence, the ALJ determined that while Harris has severe impairments, these impairments do not meet or medically equal a listed impairment under the regulations. The ALJ further concluded that Harris retains the residual functional capacity to perform simple, routine, light work that does not include heavy lifting or close proximity to others. In making this determination, the ALJ stated that he did not find totally credible the subjective complaints of the plaintiff.

The plaintiff contends that the ALJ erred by not sending her a copy of the consultative psychological exam performed by Dr. Booher, and that because she did not have a copy of the report, she was unable to respond to it before the ALJ issued his decision. The ALJ ordered the consultative examination at the plaintiff's hearing and rendered his decision after receiving the report.

The plaintiff cites to *Kelly v. Chater*, 952 F. Supp. 419, 424-25 (W.D. Tex. 1996), in support of her argument. In that case, the ALJ relied on a post-hearing examination without providing the claimant the opportunity to review the results of

the exam and request a supplemental hearing to submit additional controverting evidence. *See id.* The court held that this violated the claimant's right to due process and the claimant's case was remanded. *See id.*

I find that *Kelly* is distinguishable from the facts in this case. First, in *Kelly*, the court noted that the due process error was "magnified" by the fact that the post-hearing psychological report, which found that the claimant had no psychological impairment, was directly contrary to the findings of three of the claimant's treating physicians. *See id.* at 425. The ALJ accepted the post-hearing report and discredited the treating physicians' findings without providing reasons for discrediting those findings. *See id.*

Here, Dr. Booher's report found Harris to have only mild mental impairments. The ALJ accepted this opinion because it was consistent with the fact that the plaintiff had not sought treatment for depression or anxiety in the past, and because finding that Harris had a severe mental impairment was inconsistent with Harris' reported daily activities, which include doing house chores, attending church, visiting with friends and relatives, and taking her children to school. Unlike the ALJ in the *Kelly* case, the ALJ here articulated specific reasons for accepting the post-hearing examination in light of the record as a whole.

Moreover, when Harris became aware of the ALJ's reliance on Dr. Booher's report, she could have presented any additional rebuttal evidence for review by the Appeals Council. Fourth Circuit case law requires the Appeals Council to review any additional evidence if it is new, relates to the period before the ALJ's decision, and "if there is a reasonable possibility that the new evidence would have changed the [ALJ's decision]." *Wilkins v. Sec'y, Dep't of Health & Human Servs.*, 953 F.2d 93, 96 (4th Cir. 1991). Harris clearly had the opportunity to submit rebuttal evidence, but she failed to do so.

Finally, even if Harris was denied due process by not receiving a copy of Dr. Booher's report, remand would be futile "because there is no question but that [the ALJ] would have reached the same result notwithstanding his initial error." *Mickles v. Shalala*, 29 F.3d 918, 921 (4th Cir. 1994). *See also Ward v. Comm'r of Soc. Security*, 211 F.3d 652, 656 (1st Cir. 2000) ("While an error of law by the ALJ may necessitate a remand, remand is not essential if it will amount to no more than an empty exercise.") (citations omitted). Given the plaintiff's reported daily activities and the record as a whole, I find that, notwithstanding Dr. Booher's report, there is substantial evidence to support the ALJ's decision that Harris does not suffer from a disabling impairment.

For the foregoing reasons, the Commissioner's motion for summary judgment will be granted and an appropriate final judgment will be entered.

DATED: July 28, 2003

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United States District Judge